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The four law partners looked at each other with painful glances. They had been together for many years and started the firm on a handshake and an oral agreement to split income and liabilities equally. Each partner had contributed an equal amount of capital to start the firm. They had trusted each other to the point that no one had ever raised the prospect of a written partnership agreement let alone dissolution. But sitting at the end of the conference table was one of the partners having just announced that he wanted to dissolve the partnership and take his considerable collection of contingency fee cases with him. The other partners were stunned. Could he really expect to keep these cases and not share the income realized from them? How could they stop him? How could they resolve this situation in a way that would be fair and equitable to all the partners?

INTRODUCTION

The subject of this Article focuses on the concerns raised in this opening scene. It compares the results under the Uniform Partnership Act (the "UPA") with the potential results under the Revised Uniform Partnership Act (the "RUPA")[1] while examin-

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1. The Revised Uniform Partnership Act, also referred to as the Uniform Partnership Act of 1993, was drafted by the National Conference of Commissioners on Uniform State Laws and was approved and recommended for enactment in all

ing the impact on the relationship of law firm dissolutions and contingent fee cases. Specifically, this Article focuses on the "No Compensation Rule" of section 18(f) of the UPA and the case law developed thereunder, and compares that section to section 401(h) of the RUPA.[2]

Under the general heading of "A Partner's Rights & Duties," Section 401(h) of the RUPA provides as follows:

> A partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership.[3]

This section omits the reference to a "surviving" partner that is currently found in section 18(f) of the UPA. The comments provided by the drafting committee state:

> Subsection (h) continues the UPA § 18(f) rule that a partner is not entitled to remuneration for services performed except in winding up the partnership. Subsection (h) omits the reference to a "surviving" partner in UPA § 18(f). This means that any partner winding up the business is entitled to compensation, not just a surviving partner winding up after the death of another partner.[4]

As of the time of writing this Article, three states have already adopted the RUPA. They are Montana, Texas, and Wyoming.[5] Each of these states has adopted the precise language of Section 401(h) of the RUPA. In the case of Montana, by adopting section 401(h) verbatim, it has adopted a legislative enactment that is contrary to its prior decisional case law.[6] Such an enactment is of significant importance as various other state legislatures debate the wisdom of adopting the RUPA, and specifically section 401(h).[7]

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the states at its annual conference in Charleston, South Carolina, July 30-August 6, 1993. The official comments were completed in October, 1993.

2. The "No Compensation Rule" refers to the rule which denies a partner entitlement to compensation for services performed for the partnership other than reasonable compensation to a surviving partner. UNIF. PARTNERSHIP ACT § 18(f), 6 U.L.A. 213 (1969). *See* Jewel v. Boxer, 203 Cal. Rptr. 13, 17-20 (Cal. Ct. App. 1984); Rosenfeld, Meyer & Susman v. Cohen, 194 Cal. Rptr. 180, 189-92 (Cal. Ct. App. 1983); Frates v. Nichols, 167 So. 2d 77, 80-81 (Fla. Dist. Ct. App. 1964).

3. REVISED UNIF. PARTNERSHIP ACT § 401(h) (1993).

4. REVISED UNIF. PARTNERSHIP ACT § 401(h) cmt. 8.

5. MONT. CODE ANN. §§ 35-10-101 to 35-10-644 (1993); TEX. REV. CIV. STAT. ANN. art. 6132b-1.01 to 6132b-10.04 (West 1994); WYO. STAT. ANN. §§ 17-21-101 to 17-21-1003 (1994).

6. *See, e.g.*, Mehl v. Mehl, 786 P.2d 1173 (Mont. 1990); *In re* Mondale & Johnson, 437 P.2d 636 (Mont. 1968).

7. *See* Gull v. Van Epps, 517 N.W.2d 531, 537 (Wis. 1994) (upholding the No Compensation Rule and stating that if the rule against extra compensation was to be modified, it was up to the legislature to revise UPA by adopting the RUPA).

It is this author's contention that the logical interpretation of the language in the comments accompanying 401(h) leads to the conclusion that the drafters fully intend that this provision overturn a considerable body of case law which has applied and defined the No Compensation Rule.[8] This author supports this new provision; however, the drafters did not provide or articulate a standard, formula, or methodology to be utilized by courts faced with this issue of requested compensation. Accordingly, the final section of this Article will suggest a standard that courts may use when confronted with the issues of whether to award compensation and if so, how to determine the actual amount of compensation to award to a requesting partner.

The importance of this change is predicated upon two factors: (1) the current popularity of law firms organized as partnerships,[9] and (2) the increasing frequency with which partnerships have divided or dissolved entirely. Although there is no accurate tabulation concerning the actual number of law partnerships that dissolve each year, it is sufficient to say that the number of breakups has risen and has been accompanied by an increase in publicity about law firm dissolutions.[10]

Law partnerships typically dissolve when the partners decide that they no longer wish to continue to practice together as a group.[11] Some of the major reasons for firms dissolving are:

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8. Leading cases defining the No Compensation Rule include: Jewel v. Boxer, 203 Cal. Rptr. 13, 17-20 (Cal. Ct. App. 1984); Rosenfeld, Meyer & Susman v. Cohen, 194 Cal. Rptr. 180, 189-92 (Cal. Ct. App. 1983); Chazan v. Most, 25 Cal. Rptr. 864 (Cal. Ct. App. 1962); Beckman v. Farmer, 579 A.2d 618 (D.C. 1990); Frates v. Nichols, 167 So. 2d 77, 80-81 (Fla. Dist. Ct. App. 1964); Ellerby v. Spiezer, 485 N.E.2d 413 (Ill. App. Ct. 1985); Flynn v. Cohn, 607 N.E.2d 1236 (Ill. 1992); Resnick v. Kaplan, 434 A.2d 582 (Md. Ct. Spec. App. 1981); Meehan v. Shaughnessy, 535 N.E.2d 1255 (Mass. 1989); Smith v. Daub, 365 N.W. 2d 816 (Neb. 1985); Kirsch v. Leventhal, 586 N.Y.S.2d 330 (N.Y. App. Div. 1992); Platt v. Henderson, 361 P.2d 73 (Or. 1961); Gull v. Van Epps, 517 N.W.2d 531 (Wis. 1994). In addition, courts have applied the No Compensation Rule to legal professional corporations. *See* Fox v. Abrams, 210 Cal. Rptr. 260 (Cal. Ct. App. 1985); Sullivan, Bodney & Hammond v. Bodney, 820 P.2d 1248 (Kan. Ct. App. 1991); Marr v. Langhoff, 589 A.2d 470 (Md. 1991).

9. In 1985, 53% of practicing attorneys practiced in firms comprised of two or more lawyers. BARBARA A. CURRAN, ET AL., SUPPLEMENT TO THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1985 4 (1986).

10. "It is indisputable that the last ten years have witnessed an explosion in publicized law firm breakups." Laurel S. Terry, *Ethical Pitfalls and Malpractice Consequences of Law Firm Breakups*, 61 TEMP. L. Q. 1055, 1058 (1988). *See also* J. William Callison, *Partnership Law Issues in the Break-up and Dissolution of Law Firms*, 21 COLO. LAW. 409, 409 (1992).

11. Richard S. Green, *Firm Dissolutions: Causes and Effects*, *in* LAW FIRM AGREEMENTS AND DISAGREEMENTS 1988, at 167 (PLI Comm. Law & Practice Course Handbook Series No. 475, 1988).

1. dissension or lack of trust;
2. disagreement over firm management;
3. loss of business;
4. outside factors such as obtaining new financing, moving,[12] and
5. income distribution within the firm.[13]

One of the difficulties that firms can encounter during the dissolution process is the absence of a thoroughly drafted partnership agreement which envisions and clearly articulates what will occur in the event of dissolution. In spite of the potential difficulties associated with the lack of a written agreement, many law firms organized as partnerships do not have a written partnership agreement.[14] In fact, a significant percentage of firms doing business as partnerships do so on the basis of an oral agreement.[15] Typically the partners may orally agree on partnership interests including the method of dividing liabilities and profits (usually expressed in percentages).

However, even these more detailed oral agreements may not deal with the prospect of dissolution. Accordingly, when dissolution does occur, the partners may find themselves at a loss in determining how to resolve the situation.[16] In such situations the UPA, as adopted by all of the states except Louisiana, governs the results unless the parties have agreed otherwise.[17] The RUPA continues this same practice of governing in the absence of an agreement.[18]

In the absence of an agreement, under both the UPA and the RUPA, dissolution is typically a two-step process.[19] The first

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12. Green, cited at note 11, at 167.

13. Jeffrey L. Tolman, *Why Partnerships Fail*, 15 LEGAL ECON. 46 (1989).

14. *See, e.g.*, Smith v. Daub, 365 N.W. 2d 816, 821 (Neb. 1985); Jewel v. Boxer, 213 Cal. Rptr. 13, 15 (Cal. Ct. App. 1984) (noting that "contrary to the sound legal advice they undoubtedly always gave their partnership clients, [the attorneys] had no written partnership agreement"). *See also* Anthony L. Marks, *Barefoot Shoemakers: An Uncompromising Approach to Policing the Morals of the Marketplace When Law Firms Split Up*, 19 ARIZ. ST. L.J. 509, 509 n.3 (1987).

15. Partnership agreements may be oral or implied from the conduct of the parties. 1 ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP § 2.13 (1994). *See* Boyd v. Walker, 251 So.2d 332 (Fla. Dist. Ct. App. 1971); Missan v. Schoenfeld, 445 N.Y.S.2d 856 (N.Y. App. Term. 1981).

16. When no partnership agreement exists or when it does not address dissolution matters, substantial legal issues may have to be resolved via litigation or alternative dispute resolution. Callison, cited at note 10, at 409.

17. *See* UNIF. PARTNERSHIP ACT § 18, 6 U.L.A. 213 (1969) (entitled "Rules Determining the Rights and Duties of Partners," and stating that "[t]he rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules").

18. *See* REVISED UNIF. PARTNERSHIP ACT § 103 (1983).

19. Under the RUPA some confusion may arise between the use of the terms

step involves the dissolution. Dissolution is defined as "the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on . . . of the business."[20] However, following the decision to dissolve, the partnership continues until it completes the winding up of partnership affairs.[21] During this winding-up phase, the partners complete the business of the partnership, liquidate assets, settle liabilities, and distribute profits, if any, among the partners.[22] As a result, a partner's claim to income or profits does not terminate upon the date of dissolution, but rather a partner has an interest in income derived from the completion of the partnership's "unfinished business." This concept of "unfinished business" typically involves the completion of the firm's active cases.[23]

Accompanying a partner's interest in income derived from the completion of the partnership's cases is the fiduciary duty of each partner to wind up and complete the business of the partnership. This interest and duty is often expressed as the "Unfinished Business Rule." The Unfinished Business Rule expressly recognizes that the decision to dissolve does not conclude or terminate the fiduciary relationship of the parties, but rather it requires that this relationship last until the winding up phase is complet-

"dissolution" and "dissociation." Under the RUPA, dissolution is a term used to signify the beginning of the winding up process. However, the term dissociation indicates a change in relationship among the partners, similar to the definition of dissolution under the UPA, such as a buy-out of a partner's interest or a termination and liquidation of assets. *See* REVISED UNIF. PARTNERSHIP ACT §§ 801, 802. Further, under the RUPA, the concept of dissociation includes a 90 day "cooling off" period before the winding-up process begins. For thorough and interesting analyses concerning the potential confusion in these terms see Donald J. Weidner, *Three Policy Decisions Animate Revision of Uniform Partnership Act*, 46 BUS. LAW. 427 (1991) and Arnold M. Wensinger, *The Revised Uniform Partnership Act Breakup Provisions: Stability or Headache?*, 50 WASH. & LEE L. REV. 905 (1993). However, it is beyond the scope of this Article to discuss this issue in further detail.

20. UNIF. PARTNERSHIP ACT § 29, 6 U.L.A. 364 (1969).

21. When a partnership is dissolved it is not terminated, but it continues until the affairs of the partnership have been wound up. UNIF. PARTNERSHIP ACT § 30, 6 U.L.A., 367 (1969).

22. UNIF. PARTNERSHIP ACT § 40, 6 U.L.A. 468-69 (1969). See also note 28 and accompanying text.

23. The "unfinished business rule" derives from section 21(1) of the UPA. Section 21(1) provides that profits or benefits derived from the unfinished business of a partnership during the winding up period must be held in trust for the partnership, without regard to how a partner came to complete the unfinished business and receive the associated profits. *See* UNIF. PARTNERSHIP ACT § 21(1), 6 U.L.A. 258 (1969); Rodney M. Confer & Cheryl R. Zwart, *"Disintegrating Erosion" of Fiduciary Duty in the Dissolution of a Partnership at Will*, 70 NEB. L. REV. 107, 146-47 (1991). *See also* Rosenfeld, Meyer, & Susman v. Cohen, 237 Cal. Rptr. 14, 23 (Cal. Ct. App. 1987); Steeby v. Fial, 765 P.2d 1081 (Colo. Ct. App. 1988); Beckman v. Farmer, 579 A.2d 618 (D.C. 1990); Ellerby v. Spiezer, 485 N.E.2d 413 (Ill. App. Ct. 1985); Meehan v. Shaughnessy, 535 N.E.2d 1255, 1266 (Mass. 1989).

ed and the partnership is finally terminated.[24]

Included in a firm's assets are its active cases. These cases may be based on a variety of fee agreements between the firm and client. The typical fee agreements are either fixed fees (also known as a flat amount fee), hourly rate fees, or contingent fees. A contingent fee is an agreement between an attorney (or firm) and client where the attorney (or firm) agrees to represent the client for compensation based upon an agreed percentage of the amount recovered.[25] The particular problems arising from ongoing contingent fee cases in dissolution and during the winding up phase are whether they are to be considered an asset of the partnership,[26] and if so, whether these cases have a present value at the announced time of dissolution.[27] A further problem is whether they are subject to the "winding up process,"[28] allocating an amount of compensation to the partner who completes the case, and dividing the fee within the dissolving partnership structure. Because of the unique nature of contingent fees, if the case is not successful and results in no affirmative judgment or settlement, obviously there is no fee.[29] Therefore, within the partnership structure and during the dissolution process itself, the problem of allocating the risk of no recovery arises. Also, the completion of

24. UNIF. PARTNERSHIP ACT § 21. According to section 21(1) of the Act, the fiduciary duty continues during the winding up phase of the partnership. *Id. See generally* 2 ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP § 7.08 (1994); *see also* Leff v. Gunter, 658 P.2d 740, 744 (Cal. 1983); *Beckman*, 579 A.2d at 636.

25. *See* Richard M. Birnholz, Comment, *The Validity and Propriety of Contingent Fee Controls*, 37 UCLA L. REV. 949, 952 (1990).

26. There is authority on both sides of this issue. One line of cases indicates that contingency fee cases are firm assets. *See* Kreutzer v. Wallace, 342 So. 2d 981 (Fla. Dist. Ct. App. 1977); Frates v. Nichols, 167 So. 2d 77, 80-81 (Fla. Dist. Ct. App. 1964); Due v. Due, 342 So. 2d 161 (La. 1977); Pellerin v. Pellerin, 550 So. 2d 1250 (La. Ct. App. 1989); Resnick v. Kaplan, 434 A.2d 582, 587 (Md. Ct. Spec. App. 1981); Dwyer v. Nicholson, 602 N.Y.S.2d 144 (N.Y. App. Div. 1993); Bader v. Cox, 701 S.W.2d 677 (Tex. Ct. App. 1985). Another line of cases has held that such cases are not assets of the partnership. *See, e.g.*, Aurnou v. Greenspan, 555 N.Y.S.2d 356 (N.Y. App. Div. 1990).

27. Some courts have held that due to the uncertainty of return in contingency fee arrangements no value can be assigned to them. *See In re* Marriage of Zells, 554 N.E.2d 289, 292 (Ill. App. Ct. 1990); Quinn v. Quinn, 575 A.2d 764, 769 (Md. Ct. Spec. App. 1990); Lamparski v. Sikov, Lamparski & Woncheck, 559 A.2d 544, 557 (Pa. Super. Ct. 1989).

28. Winding up is defined as, "the process of settling partnership affairs after dissolution." UNIF. PARTNERSHIP ACT § 29 off. cmt., 6 U.L.A. 635 (1969). The process typically includes completing unfinished partnership work, selling partnership assets, and collecting outstanding debts.

29. For an alternative explanation see MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 (1983). The rule provides that if the client recovers nothing, there is no fee paid to the attorney. *Id.*

these cases can be protracted while still subject to the winding up process.

The remainder of this Article is organized into three sections. First, the justifications used to support the No Compensation Rule are examined. Next, the criticisms of the No Compensation Rule and the justifications for adopting the RUPA approach are analyzed. Finally, a standard to be applied under the RUPA is suggested.

JUSTIFICATIONS FOR UTILIZING THE NO COMPENSATION RULE

In order to fully understand and evaluate the potential impact of section 401(h) of the RUPA, it is critical to understand the No Compensation Rule and its justifications as it has developed under section 18(f) of the UPA. The No Compensation Rule provides that partners are not entitled to compensation for the winding up of the dissolved partnership beyond their partnership interests for services rendered.[30] An exception to the rule exists where dissolution is caused by the death of a partner.[31] In such a situation, the surviving partners are allowed compensation for their efforts in winding up the partnership business.[32] As was stated earlier, section 401(h) of the RUPA would allow compensation at any time.[33]

Although application of the No Compensation Rule often yields seemingly inequitable results,[34] courts have found various policy reasons for applying it. These considerations have included: discouraging battles over cases and possession of files, preserving client choice, preserving freedom of contract, encouraging fiduciary duties among partners, and promoting judicial economy.

Discourages Battles Over Cases

By prohibiting attorneys from receiving compensation in addition to their partnership interests, the No Compensation Rule has the effect of discouraging partners from competing for control over potentially lucrative cases.[35] If partners are compensated

30. UNIF. PARTNERSHIP ACT § 18(f). See note 8 for court decisions which have defined the No Compensation Rule.

31. UNIF. PARTNERSHIP ACT § 18(f).

32. REVISED UNIF. PARTNERSHIP ACT § 401(h) cmt. 8.

33. *See* REVISED UNIF. PARTNERSHIP ACT § 401(h).

34. An inequitable result occurs when winding up burdens are not distributed according to partnership interests; some partners are deprived while others receive a windfall.

35. In the absence of such a rule a partner working on a potentially lucrative contingency fee case may be tempted to dissolve the partnership and take the case

strictly on the basis of their partnership interest, there is no financial incentive for them to battle during the lifetime of the partnership over cases with foreseeably highly remunerative results.

This rationale for applying the No Compensation Rule has been cited in cases from various jurisdictions. In *Kirsch v. Leventhal*[36] for instance, the New York Appèllate Division granted a withdrawing partner his partnership interest in a contingency fee collected after the partnership had dissolved.[37] The court rejected one partner's contention that because the lucrative case was a contingency fee case that had not been disposed of before the partnership was dissolved, the withdrawing partner was not entitled to his partnership share and was only entitled to the quantum meruit value of the services he performed on the case.[38] Granting the withdrawing partner his partnership share of the realized contingency fee, the court reasoned that allowing extra compensation to the partner who completed the case would "encourage an unseemly and potentially unethical battle . . . over the clients of the firm whose files have the best prospects for an eventual lucrative recovery."[39]

This reasoning was echoed by the California Court of Appeals in *Jewel v. Boxer*.[40] In *Jewel*, a law partnership divided to form two law firms.[41] Cases which were unfinished at the time of the original firm's dissolution were found to be assets of the original firm and fees collected therefrom were disbursed according to the original firm's partnership interests.[42] Justifying its denial of quantum meruit recovery to the partners who completed the cases, the court commended the No Compensation Rule for negating any incentive to compete for cases while the partnership was a going concern so as to retain them in the event of dissolution.[43]

In addition to avoiding battles over potentially lucrative cases during the lifetime of the partnership, the *Jewel* court concluded that the No Compensation Rule "discourages former partners from scrambling for possession of files and . . . soliciting the

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on his own so as not to share the profits of the case with his former partners.

36. 586 N.Y.S.2d 330 (N.Y. App. Div. 1992).

37. *Kirsch*, 586 N.Y.S.2d at 332.

38. *Id.*

39. *Id.* at 333.

40. 203 Cal. Rptr. 13 (Cal. Ct. App. 1984).

41. *Jewel*, 203 Cal. Rptr. at 15.

42. *Id.* at 18.

43. *Id.* at 18-19. For an explanation of quantum meruit recovery, see note 93 and accompanying text.

firm's existing clients upon dissolution."[44] The *Jewel* court also asserted that the rule encouraged equitable distribution of winding up burdens.[45]

Adopting similar reasoning, the Illinois Court of Appeals in *Ellerby v. Spiezer*[46] rejected granting former partners compensation in proportion to services rendered prior to dissolution. In *Ellerby* a three member partnership dissolved with various contingency fee cases pending.[47] One former partner argued that because the clients in the cases he was handling discharged the partnership and retained him individually, he was entitled to the entire fees from those cases, less a partnership claim for quantum meruit for services rendered prior to dissolution.[48] The court, however, found that abandoning the No Compensation Rule would have the detrimental effect of encouraging the individual partners to attempt to convince clients, with potentially highly remunerative cases, to discharge the partnership and hire them individually.[49] The court explained that this sort of "case-chasing" places clients exactly where they should not be: at the center of a dispute among partners over monetary gain.[50]

In *Fox v. Abrams*,[51] the California Court of Appeals applied the No Compensation Rule and its rationale to law firm corporations.[52] The court asserted that attorneys practicing together in professional corporations owed each other fiduciary duties "very similar to those owed by law partners," and therefore the fact that a professional corporation was involved was no reason to disregard the practice of splitting fees for work in progress at the time of dissolution.[53] The court noted that applying the rule of *Jewel* was equitable to both interests and precluded the lawyers from "scrambling" for existing cases as the law firm broke up.[54]

44. *Jewel*, 203 Cal. Rptr. at 18.
45. *Id.* at 19.
46. 485 N.E.2d 413 (Ill. App. Ct. 1985).
47. *Ellerby*, 485 N.E.2d at 415.
48. *Id.* at 416.
49. *Id.* at 417.
50. *Id.*
51. 210 Cal. Rptr. 260 (Cal. Ct. App. 1985).
52. *Fox*, 210 Cal. Rptr. at 265. For other cases applying the No Compensation Rule to law firm professional corporations, see note 8 and accompanying text.
53. *Fox*, 210 Cal. Rptr. at 266.
54. *Id.* at 265.

Preserves Client Choice

Many courts have decided that the No Compensation Rule does not impede client choice. Although opponents of the rule contend that it results in clients being "locked-out"[55] of their attorney of choice, the court in *Ellerby* emphasized the fact that clients were not restricted to being represented by any particular member of the dissolved partnership.[56] The court reasoned that the client's right to select an attorney was separate and did not interfere with the rights and duties between the partners regarding division of profits resulting from unfinished partnership business.[57] Once the fee was paid to an attorney, it was not the client's concern how the fee was disbursed among the partners.[58]

Similarly, the court in *Jewel* found that the client's right to his attorney of choice was distinct and did not conflict with the rights and duties between partners with respect to income from unfinished business.[59] The court noted that the rule did not discourage attorneys from representing former clients after dissolution because they would receive the same percentage of the fee as if the firm had not dissolved.[60]

Similarly, the Maryland Court of Special Appeals, in *Resnick v. Kaplan*,[61] upheld the No Compensation Rule.[62] In *Resnick*, one of five former law partners withdrew and continued to represent various clients which he had represented prior to dissolution.[63] The withdrawing partner contended that he alone was entitled to the fees because it was his clients' choice to continue to be represented by him.[64] The court, however, disagreed and held that the client's absolute right to the attorney of his choice did not prevent the fees earned by the chosen partner from being divided among the former partners.[65]

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55. *See* Mark H. Epstein & Brandon Wisoff, Comment, *Winding Up Dissolved Law Partnerships: The No-compensation Rule and Client Choice*, 73 CAL. L. REV. 1597, 1599 (1985) (using the term "lock out" to describe the phenomenon which occurs when partners dissolve in good faith but are unable or unwilling to continue representing a client post-dissolution because the amount of work involved in the representation would be vastly disproportionate to their compensation).

56. *Ellerby*, 485 N.E.2d at 416.

57. *Id.*

58. *Id.*

59. *Jewel*, 203 Cal. Rptr. at 17.

60. *Id.* at 16-19.

61. 434 A.2d 582 (Md. Ct. Spec. App. 1981).

62. *Resnick*, 434 A.2d at 587.

63. *Id.* at 585.

64. *Id.*

65. *Id.* at 588.

Preserves Judicial Economy

A significant advantage of the No Compensation Rule is its practicality due to its mechanical application. In implementing the rule, courts need not examine the dissolution process on an ad hoc basis to determine the fee proportion owed to each partner.[66] The automatic application of the No Compensation Rule by courts also encourages private dispute resolution. Abandoning the rule in favor of quantum meruit compensation would force courts to examine, weigh, and formulate various factors to determine the amount of compensation owed to former partners. Courts would have to determine what percentage of the fee was accrued before and after dissolution, the expected value of the case, and how much time the partner actually spent working on the case.

Encourages the Fiduciary Duty Among Partners

Section 21 of the UPA defines the partners' fiduciary duty as accounting for any benefit derived without the consent of the other partners from a "transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property."[67] The main elements comprising the fiduciary duty within a partnership are utmost good faith, fairness, and loyalty.[68] Although a problem arises in determining the precise delineation of the scope of the duty, especially as it impacts on the reasons for terminating a law partnership, case law has been helpful in elaborating on the general parameters of the fiduciary duty.[69]

66. *See Jewel*, 203 Cal. Rptr. at 18-19.

67. UNIF. PARTNERSHIP ACT § 21. According to courts that have interpreted section 21(1), the fiduciary duty continues during the winding up phase of the partnership. *See* Leff v. Gunter, 658 P.2d 740, 744 (Cal. 1983).

68. BROMBERG & RIBSTEIN, cited at note 15, § 6.07.

69. In trying to define "good faith" as it applies to the decision to dissolve, two general schools of thought have developed. The first, set forth in a line of California decisions, applies a good faith standard to a partner's withdrawal decision. *See, e.g.*, Page v. Page, 359 P.2d 41, 44 (Cal. 1961) (indicating that there is liability for partners who act in bad faith to cause dissolution); *see also* Rosenfeld, Meyer & Susman v. Cohen, 194 Cal. Rptr. 180, 188 (1983) (finding that law partners do not have the right to dissolve in bad faith). Bad faith in *Rosenfeld* was defined as existing when the decision to dissolve results in a transfer of ongoing partnership business to the withdrawing partner. *See Rosenfeld*, 194 Cal. Rptr. at 188-90.

The second school of thought concentrates more on the procedure and process employed by a partner in his decision to withdraw. *See, e.g.*, Meehan v. Shaughnessy, 535 N.E.2d 1255, 1262 (Mass. 1989) (finding no breach of fiduciary

The fiduciary duty is two-fold. First, the UPA requires partners to account to the partnership, and second, it delineates the duties between partners.[70] Partners deal with each other in connection with partnership business as fiduciaries. Just as the partner is held to a high standard of loyalty when presented with a partnership opportunity, likewise the partner is held to an equally strict standard in transactions with the firm or co-partners.[71]

Property belonging to the partnership is to be used by the partners for partnership, rather than for individual purposes. Section 21(1) of the UPA provides that any benefit derived by a partner from acquisition or use of partnership property without co-partner consent must be shared with the other partners.[72]

Unauthorized benefits from partnership property for which the partner must account include taking over a partnership contract.[73] Section 21(1) of the UPA makes clear that the fiduciary duties exist during the normal operation of the partnership as well as during the winding-up period.[74] A partner must not take partnership property after dissolution. Partnership property includes a law firm's case that is in progress before dissolution, and is completed as part of the winding up of the firm.[75] This means that winding up continues as long as there are outstanding cases. Further, because the withdrawing partner is accountable to others as a fiduciary and a misappropriation of partnership income is actionable, there is great disincentive to "grab."[76]

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duty in the decision to dissolve even when dissolving partners had a secret plan to compete with former firm, but the court found a breach in the manner in which the dissolving partners took clients from the partnership). Under the UPA, unless otherwise agreed, law firm partnerships are considered to be "at will" and as such, the decision to dissolve typically requires no justification. *See* Stainton v. Tarantino, 637 F.Supp. 1051 (E.D. Pa. 1986); Girard Bank v. Haley, 332 A.2d 443 (Pa. 1975).

70. BROMBERG & RIBSTEIN, cited at note 15, § 6.72.

71. *See* Creswell v. Keith, 361 S.W.2d 542 (Ark. 1962); Malden Trust Co. v. Brooks, 177 N.E. 629 (Mass. 1931); Penner v. De Nike, 285 N.W. 33 (Mich. 1939).

72. UNIF. PARTNERSHIP ACT § 21 (1969).

73. *Rosenfeld*, 194 Cal. Rptr. at 189-90.

74. *Id.* at 190.

75. *Id.* at 189-90. *See also* Bracht v. Connell, 170 A. 297 (Pa. 1933).

76. The term "grabbing" derives from Professor Hillman's article and is used to refer to a partner's taking of clients from his former firm. *See* Robert W. Hillman, *Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving*, 67 TEX L. REV. 1, 4 n.11 (1988). UPA section 21(1) emphasizes the fact that the fiduciary duty carries over into the winding-up phase of a partnership. *See* UNIF. PARTNERSHIP ACT § 21(1). The RUPA does not depart from this concept. *See* REVISED UNIF. PARTNERSHIP ACT §§ 404(a)-(c) (1993). Courts have emphasized that the partners' fiduciary duties continue until the windup was completed. *See* Fox v. Abrams, 210 Cal. Rptr. 260 (Cal Ct. App. 1985); Jewel v. Boxer, 203 Cal. Rptr. 13 (Cal. Ct. App. 1984); Beckman v. Farmer, 579 A.2d 618 (D.C. 1990); Ellerby v.

In *Ellerby*, the court held that as a part of a partner's fiduciary duty with regard to unfinished partnership business, he had to "wind it up and complete it for the partnership."[77] The court noted that he was not entitled to take any course of action regarding the unfinished business that led solely to personal gain, such as having the client terminate the partnership and retain him individually.[78] In *Frates v. Nichols*,[79] following the dissolution of the law firm, one withdrawing partner took several contingency fee cases with him to his practice.[80] The departing attorney argued that because he brought the cases into the partnership and he completed the cases after dissolution, his former partners were not entitled to any share of the fees realized.[81] The court disagreed, and held that a law partner in dissolution owed a duty to his former firm to wind up the former firm's pending business, and that he was not entitled to any additional compensation.[82]

The court in *Kirsch v. Leventhal*[83] cited a similar rationale for denying compensation. The court contended that limiting a withdrawing partner's interest in contingent fee cases pending at the time of dissolution to the quantum meruit value of that partner's services performed on the cases was inconsistent with the fiduciary duty of the partner in possession of the post-dissolution business to wind up and complete performance for the benefit of all partners.[84] As a result, a strict application of the No Compensation Rule encourages compliance with the fiduciary duty among partners. Because all partners are under a duty to wind up the affairs of the partnership, the No Compensation Rule successfully ensures that the burdens of completing firm business are distributed equally.[85]

Spiezer, 485 N.E.2d 413 (Ill. App. Ct. 1985); Smith v. Daub, 365 N.W.2d 816 (Neb. 1985); *see also* BROMBERG & RIBSTEIN, cited at note 15, § 7.08.

77. *Ellerby*, 485 N.E.2d at 416.

78. *Id.* at 416-17.

79. 167 So. 2d 77 (Fla. Dist. Ct. App. 1964).

80. *Frates*, 167 So. 2d at 79.

81. *Id.* at 80-81.

82. *Id.* at 80.

83. 586 N.Y.S.2d 330 (N.Y. App. Div. 1992).

84. *Kirsch*, 586 N.Y.S.2d at 333; *see also* Resnick v. Kaplan, 434 A.2d 582 (Md. Ct. Spec. App. 1981); Smith v. Daub, 365 N.W.2d 816 (Neb. 1985); Platt v. Henderson, 361 P.2d 73 (Or. 1961); Walker v. Goodrich, 16 Ill. 341 (1855); Shelly v. Smith, 170 N.E. 826 (Mass. 1930).

85. *Jewel*, 203 Cal. Rptr. at 19-20.

Preserves Freedom of Contract

Proponents of the No Compensation Rule maintain that the rule preserves the former partners' freedom of contract. The risk that fees will not be divided exactly in proportion to dissolution burdens is voluntarily assumed by partners when they do not provide for fee disbursement in their agreement. Partners have the freedom to draft their partnership agreements in a way which ensures that dissolution yields appropriate results.

The court in *Jewel* expressed that any inequitable results which stemmed from the application of the No Compensation Rule had to be borne by the former partners as a consequence of their failure to provide for dissolution in their original agreement.[86] The court noted that partners were in the position to define their own relationships at the onset of formation, therefore partners were accountable for their inability to draft a provision to provide for more equitable results.[87]

Similarly, in the case of *Berkson v. Berryman*,[88] the court denied compensation to a former partner despite the fact that he did most of the work on the cases before, during, and after the partnership existed. The *Berkson* court stated that:

> [T]he partnership was short-lived . . . the parties are mutually bound to the contractual and legal rights and obligations which arose by reason of the formation of the partnership. They are likewise bound by the mutual rights and obligations which exist either by contract or partnership law upon dissolution and in connection with the winding up of the partnership.[89]

Also, when a firm decides to accept a contingency fee case, it is a partnership decision. Therefore, all partners should understand the risk, and expect that recovery should not be changed as a result of compensation awarded during the dissolution process.[90] Moreover, results of post-dissolution cases may actually be the product or a combination of: pre-dissolution efforts, fortuitous results, and efforts of a different partner, i.e. a partner who

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86. *Id.*

87. *See Jewel*, 203 Cal. Rptr. at 19-20; *see also* Jacobson v. Wikholm, 172 P.2d 878, 880 (Cal. 1946); *Beckman*, 579 A.2d at 626.

88. 488 A.2d 504 (Md. Ct. Spec. App. 1985).

89. *Berkson*, 488 A.2d at 512. *See also* Kreutzer v. Wallace, 342 So.2d 981, 982 (Fla. Dist. Ct. App. 1977) (applying the No Compensation Rule because the partners' agreement failed to provide for extra compensation for winding up cases after dissolution).

90. *See Jewel*, 203 Cal. Rptr. at 19-20; *see also* La Mantia v. Durst, 561 A.2d 275, 279 (N.J. Super. Ct. App. Div. 1988).

brought a case/client to the firm.[91] For instance, if partners are sharing partnership income, those working on non-contingency cases may be "supporting" the contingency case partners between recoveries. These types of partnership "arrangements" should be recognized by the courts and not be discounted at the time of dissolution.

CRITICISM OF THE NO COMPENSATION RULE AND THE JUSTIFICATIONS FOR ADOPTING THE RUPA APPROACH

The UPA's No Compensation Rule has been subject to some criticism. Despite the advantages discussed in the previous section, the mechanical application of the rule has been criticized for various reasons. Among these are its potential for yielding inequitable results, that it may encourage "bad faith" dissolution, that it may cause client "lock-out" (i.e. undermine client choice) and attorney "lock-in" (i.e. force dissatisfied partners to stay together), and that it may have the effect of limiting freedom of contract.[92] These results are the very opposite of its purported advantages.

Despite the policies cited by courts to justify their adherence to the No Compensation Rule, a few courts have declined to apply it. These courts have retained the UPA's doctrine of unfinished business but have allowed compensation to the winding up partner in the form of quantum meruit recovery where it was necessary to prevent inequitable results.[93]

Section 401(h) is squarely aimed at answering the criticisms of the No Compensation Rule under the current UPA approach. It attempts to curb the inequitable results sometimes caused by the mechanical application of the No Compensation Rule. It further tries to discourage bad faith dissolution, while at the same time, preserves client choice and the partners' freedom of contract.

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91. *See* BROMBERG & RIBSTEIN, cited at note 15, § 7.08.

92. *See* Epstein & Wisoff, cited at note 55, at 1615-19.

93. *See* Denver v. Roane, 99 U.S. 355, 358 (1878); Jacobson v. Wikholm, 172 P.2d 878, 879-80 (Cal. 1946); Champion v. Superior Court, 247 Cal. Rptr. 624, 627 (Cal. Ct. App. 1988); Jones v. Marshall, 135 P. 841, 842 (Idaho 1913); *In re* Mondale & Johnson, 437 P.2d 636, 641 (Mont. 1969); Lamb v. Wilson, 92 N.W. 167, 168 (Neb. 1902); Bracht v. Connell, 170 A. 297, 300 (Pa. 1933); Cofer v. Hearne, 459 S.W.2d 877, 879 (Tex. Ct. App. 1970). Compensation may be a function of: 1) the amount of work done in excess of that done by the other partners and 2) the expected value of the extra work as of the date of dissolution. *See* Epstein & Wisoff, cited at note 55, at 1621.

Difficulties in Applying the No Compensation Rule to Law Firm Partnerships

Much has been written with respect to the existence of certain difficulties in applying the dissolution rules and specifically, the No Compensation Rule, to law firm partnerships.[94] It has been described pointedly as fitting a "square peg in a round hole."[95] The major difficulty stems from the fundamental differences between a commercial partnership whose assets consist of goods and services, and a professional service partnership like a law firm whose major assets consist of on-going client cases.[96] Unlike a commercial partnership, liquidating assets in a law firm may take a long period of time.[97] In addition, the UPA presumes the winding up period to be a cooperative venture. However, dissolving law firms are often hindered by the strained relations between the partners during the winding up process.[98]

In addition, the relationship with clients makes law firm partnerships unique, for unlike a commercial enterprise, the on-going cases of a law firm (executory contracts) cannot be sold or assigned to another law firm.[99] Also, the winding-up burdens imposed on an individual law firm partner during dissolution may be arbitrary. The degree of burden depends on several possibilities, including initial case assignment, area of specialization, and redistribution of caseload either prior to dissolution or at the time of dissolution.[100] These differences are exaggerated by disproportionate winding up burdens coupled with the prohibition against extra compensation.

The RUPA's approach should alleviate this major difficulty. To the extent that partners in the dissolving firm contribute equally during the winding up phase, no extra compensation for a partner would be required. However, where the winding up burdens are disproportionate among the partners, the courts would be authorized to award extra compensation.

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94. *See, e.g.*, Hillman, cited at note 76; Marks, cited at note 14, at 514.

95. *See* Marks, cited at note 14, at 514.

96. *Id.* at 514-15 n.41 (listing opinions indicating that on-going cases are assets of a law firm and are defined as "unfinished business" of the firm).

97. Marks, cited at note 14, at 515.

98. *See, e.g.*, *Rosenfeld, Meyer & Susman*, 194 Cal. Rptr. at 184-86 (a classic example of how strained these relationships can become).

99. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(B) and MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2(c).

100. Epstein & Wisoff, cited at note 55, at 1612.

Curbing Inequitable Results

Some courts have rejected the No Compensation Rule and criticized it for the appalling results it sometimes produces.[101] In some situations application of this rule may deny an attorney the benefits of his or her labor, while allowing a windfall to one of the partners who shouldered a relatively light burden during the winding up phase. In order to avoid this inequity, courts have allowed a quantum meruit recovery for the partner who performed a disproportionate winding up burden where granting an enormous fee to a former partner (based on his percentage of ownership of the firm) without any relationship to services rendered seemed blatantly unfair and unconscionable.[102] Awarding compensation to partners with comparatively heavy winding-up burdens would rectify this problem. Thus a partner who puts in substantially more work than the other former partners in the winding-up process would be reasonably compensated for his toil, thereby curbing the unjust result that would otherwise ensue.

Discouraging "Bad Faith" Dissolution

Although the No Compensation Rule purports to discourage partners from "grabbing and leaving,"[103] it may actually have the effect of encouraging them to dissolve when their winding up duties would be light in comparison to those of other partners. That is, when a partner finds himself in a position in which his winding up burdens would be relatively slight, he may opt to dissolve the partnership and thus reap the benefits of his partners' labor.

Because of this possibility, some courts have subjected a partner's decision to dissolve to a good faith standard.[104] This makes the consequences of dissolution uncertain and thus deters grabbing and leaving. It is unclear whether the No Compensation Rule adds any deterrent to grabbing and leaving which is not already present via the fiduciary duties among partners.[105]

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101. *See, e.g.*, *Cofer*, 459 S.W.2d at 879-80.

102. *See, e.g.*, *Cofer*, 459 S.W.2d at 879-80.

103. See note 76 and accompanying text discussing "grabbing."

104. See note 69.

105. The No Compensation Rule emphasizes discouraging grabbing and leaving to the exclusion of other policy goals. This may be unwarranted because it is unclear that strict adherence to the unfinished business doctrine adds a deterrent that is not already there (i.e., to dissolve in order to capture the benefits of lucrative cases yields liability for breach of fiduciary duty.) *See* Epstein & Wisoff, cited at note 55, at 1633.

That is, if a partner provokes dissolution in order to capture the benefits of lucrative cases, he will be in breach of his fiduciary duty. This breach will render him liable for bad faith dissolution.[106] Therefore, there is a great disincentive to dissolve in bad faith. Arguably, the No Compensation Rule does not enhance this existing deterrent.

By granting partners compensation for disproportionate work performed in the winding up process, the RUPA Section 401(h) eliminates the financial incentive for dissolving the partnership when one partner's burdens are substantially lighter than another's. That is, because a partner with substantially greater winding up burdens would be compensated for his or her efforts, it would not encourage partners with relatively lighter burdens to dissolve as an attempt to capture the fruits of their former partner's labor.

Preserving Client Choice

When law partnerships dissolve, clients do not see attorneys as fungible. To effectuate the goal of preserving client choice, partners at times will be required to take on unequal winding up burdens. The No Compensation Rule claims to preserve the post-dissolution right of the client to be represented by his attorney of choice. Courts which have adhered to the rule reason that the client's right to his attorney of choice is distinct and does not offend the duties among partners concerning income generated by winding up the partnership.[107]

However, critics argue that the No Compensation Rule may render the client's attorney of choice unwilling or unable to continue representing the client because his compensation would be vastly disproportionate to the work required to wind up.[108] Because the rule may force the partners to reallocate cases, a client is effectively "locked out" of retaining his attorney of choice.[109]

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106. *See, e.g.*, Rosenfeld, Meyer & Susman v. Cohen, 194 Cal. Rptr. 180, 188 (1983) (finding that law partners do not have the right to dissolve in bad faith). Bad faith in *Rosenfeld* was defined as existing when the decision to dissolve results in a transfer of ongoing partnership business to the withdrawing partner. *See Rosenfeld*, 194 Cal. Rptr. at 188-190.

107. *See, e.g.*, Meehan v. Shaughnessy, 535 N.E.2d 1255, 1262 (Mass. 1989) (finding no breach of fiduciary duty in the decision to dissolve even when dissolving partners had a secret plan to compete with former firm, but the court found a breach in the manner in which the dissolving partners took clients from the partnership).

108. See Epstein & Wisoff, cited at note 55, at 1618-19; Hillman, cited at note 76, at 4.

109. The term "Lock-out" refers to the situation in which a disenchanted part-

In this way, critics emphasize that it is the client who suffers the brunt of the No Compensation Rule.[110] By not allowing compensation for work performed, the client's chosen attorney has little incentive to continue working on that case. The No Compensation Rule discourages representation by the client's attorney of choice, as former partners will not want to perform all post-dissolution work for only a portion of the income they have generated.[111]

Although clients contract for the services of the partnership, their expectation is that one particular partner who is familiar with the case will be responsible for the handling and completion of the matter. When cases are reassigned at dissolution because it is not feasible for the partner working on the case to continue, the client's freedom to choose is undermined.

The phenomenon of "lock out" can be avoided by the RUPA Section 401(h). The financial disincentive of completing a particular client's contingent fee case which requires a disproportionate amount of time and effort, is eliminated by awarding compensation to an attorney who has excessive winding up burdens.

Preserving Freedom of Contract

Courts utilizing the No Compensation Rule have emphasized that it preserves freedom of contract by forcing parties to abide by their partnership agreements.[112] As the court noted in *Jewel*, the rule only comes into play when the partners fail to provide for dissolution fee division in their agreement.[113] However, critics of the rule argue that it actually defeats freedom of contract by encroaching upon the at-will partnership for which the partners contracted.[114]

The adoption of the RUPA Section 401(h) may alleviate this situation. By allowing compensation, dissatisfied partners with relatively burdensome winding up duties will remain free to dissolve the partnership. That is, the financial disincentive for

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ner dissolves the partnership in good faith but is not willing or able to continue with the representation of one of his former clients because the amount of work involved in the representation is significantly disproportionate to the compensation he would receive. Epstein & Wisoff, cited at note 55, at 1599. This unwillingness to continue representation may have the effect of "locking" the client out of having his interests pursued by his lawyer of choice, the attorney most familiar with his case.

110. Epstein & Wisoff, cited at note 55, at 1599.

111. *See Champion*, 247 Cal. Rptr. at 627 (noting that, "[w]hen an attorney remains willing and able to represent a client, representation should not be barred by an unconscionable partnership agreement with former partners").

112. *See, e.g., Jewel*, 203 Cal. Rptr. at 17-19.

113. *Id.*

114. *See* Epstein & Wisoff, cited at note 55, at 1610-11.

dissolving will be removed. With the disincentive removed, partnerships will remain viable as long as there exists a sound economic basis for all of the partners to continue. It may also force law firms to become more sensitive to issues of partner compensation and to encourage a periodic examination of their existing compensation plans.

In essence, the No Compensation Rule may lock dissatisfied partners into their original partnership by forcing them to stay together in a situation where their winding-up burdens would be too disproportionate to render dissolution feasible.[115] Freedom of contract would be enhanced by allowing partners wishing to dissolve to exercise their right to do so without fearing vastly unequal distribution of winding up burdens.

Cases Which Have Allowed Compensation

Although many courts have applied the UPA's No Compensation Rule in situations where the partnership agreement did not provide for the allocation of post-dissolution fees, a few courts have declined to apply it. These courts have used some of the above mentioned criticisms to justify their rejection of the rule in favor of granting quantum meruit compensation. These courts have emphasized the distinction between professional partnerships and other types of partnerships. Some courts have held that where the profits of the partnership derive solely from the professional skill and labor of the partners, compensation should be awarded.[116] These cases provide further justification for the adoption of the RUPA Section 401(h).

Compensating a Surviving Partner

As discussed earlier, the UPA makes an exception for dissolution due to the death of a partner. This exception was created because the death of a partner necessarily leaves the entire burden of winding up upon the surviving partner(s), a situation which would not ordinarily occur if all the partners were alive and participating in the partnership.[117] The fact that the UPA allows this exception demonstrates recognition of the potential

115. The concept of "lock-in" refers to the situation in which a partner wants to dissolve a partnership at will but is prevented from doing so because of the economic disincentive that may exist when winding up burdens are disproportionately distributed among partners. *See* Epstein & Wisoff, cited at note 55, at 1610-11.

116. *See, e.g.*, *Lamb*, 92 N.W. at 168.

117. *See Chazan*, 25 Cal. Rptr. at 867. *See* BROMBERG & RIBSTEIN, cited at note 15, §§ 7.08(d), 7:79-7:80.

inequities of the No Compensation Rule.[118] Even prior to the UPA's enactment, some courts allowed surviving partners to receive compensation in excess of their proportionate partnership interests.[119]

Compensation in Non-Death Dissolution Cases

Some courts have applied the rationale for compensating a surviving partner to dissolutions which were not caused by the death of one of the partners. For instance, in *Lamb v. Wilson*,[120] a three-member partnership dissolved, leaving two of the attorneys with all of the burdens of winding up one of the former partnership's contingency fee cases.[121] In deciding not to apply the No Compensation Rule, the court held that the rule should not be extended beyond the requirement of merely winding up partnership affairs.[122] That is, it should not be extended to collecting a partnership's outstanding claims, paying debts, or distributing profits.[123] The court reasoned that when it appears that time, skill, and labor have been expended by a partner in the continuance of the partnership business, he ought to be compensated for the profits he generates according to the nature of the business, the difficulties and results of the undertaking, and its necessity or desirability.[124]

Like the *Lamb* court, in *Bracht v. Connell*[125] the Pennsylvania Supreme Court allowed special compensation to partners who performed services in excess of their winding up duties.[126] In *Bracht*, prior to dissolution, two partners in the three-member firm procured a contract under the partnership name and proceeded to do all of the work involved in settling that case.[127] The court found that the services rendered in completing that case exceeded merely winding up the affairs of the partnership.[128] The court granted the two partners compensation determined by the fair value of the services and by considering the

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118. Jacobson v. Wikholm, 172 P.2d 878, 879-80 (Cal. 1946).

119. *See Jacobson*, 172 P.2d at 879; Denver v. Roane, 99 U.S. 355, 358 (1878); Jones v. Marshall, 135 P. 841, 842 (Idaho 1913); *In re* Mondale & Johnson, 437 P.2d 636, 640-41 (Mont. 1969).

120. 92 N.W. 167 (Neb. 1902).

121. *Lamb*, 92 N.W. at 168.

122. *Id.* at 169.

123. *Id.*

124. *Id.*

125. 170 A. 297 (Pa. 1933).

126. *Bracht*, 170 A. at 300.

127. *Id.*

128. *Id.* at 300.

nature of the work done, time spent, and skill used.[129]

Similarly, the court in *Cofer v. Hearne*[130] held that a law partner who does legal work on partnership business after the voluntary dissolution of the partnership was entitled to extra compensation for his work.[131] In *Cofer* a three member law partnership dissolved leaving a number of its cases unfinished.[132] The court disagreed with two of the firm's partners who argued that the fees collected from matters which came to the firm prior to dissolution were partnership assets to be equally divided regardless of when or by which partner the work was completed.[133] Instead, the court granted extra compensation to the former partner who completed the work on the matter, stating, "we cannot bring ourselves to the voluntary acceptance of a rule which is unconscionable and inequitable."[134]

Although *Champion v. Superior Court*[135] dealt with a partnership agreement, the court's decision was founded on some of the same policies which support granting compensation when no agreement exists.[136] In *Champion*, the court criticized a partnership agreement which did not provide for compensation to a withdrawing partner for causing a deprivation of the client's freedom to choose.[137] Despite its reluctance to interfere with partnership agreements, the court asserted that public policy required the protection of the interests of the former partnership's clients.[138]

The court further reasoned that while the client was free to choose the representation of the withdrawing partner, that representation could be effectively denied by prohibiting the withdrawing partner from getting reasonable compensation.[139] By failing to compensate the withdrawing partner, the client was deprived of the attorney most familiar with his case and most desired by him.[140] The *Champion* court concluded that the No Compensation Rule was unconscionable, "when a sizeable fee is granted without any relationship to services rendered, it must shock the

129. *Id.*
130. 459 S.W.2d 877 (Tex. Ct. App. 1970).
131. *Cofer*, 459 S.W.2d at 879.
132. *Id.*
133. *Id.*
134. *Id.* at 880.
135. 247 Cal. Rptr. 624 (Cal. Ct. App. 1988).
136. *Id.* at 627. The *Champion* court emphasized that the financial disincentives of the No Compensation Rule worked to the detriment of client choice. *Id.*
137. *Id.*
138. *Id.* at 627-28.
139. *Id.*
140. *Champion*, 247 Cal. Rptr. at 627.

conscience of lawyers of ordinary prudence practicing in the community."[141]

SUGGESTED STANDARD TO BE APPLIED UNDER THE RUPA

After examining the strengths and weaknesses of the No Compensation Rule, several observations need to be made. First, where partners in a dissolving law firm have contractually addressed the issue of how to compensate partners for work performed during the winding up phase, including the allocation of contingent fees, courts should uphold the stated will of the partners.[142] Nothing in the RUPA would indicate otherwise.

Second, where the dissolving partners have no agreement, the RUPA would control. However, when confronted with the issue of compensation for partners during the winding up phase, there seems to be no one test or proposal that fairly takes into account the needs of the dissolving partnership, the dissolving partners as individuals (especially those who perform a disproportionate amount of work), or the partnership's clients.[143]

When faced with these circumstances and competing interests, a court should adopt a balancing approach using the following set of factors to determine whether to award compensation and to calculate the actual amount of compensation to award an individual partner:

> 1. The partner's percentage interest in the dissolving law firm;
> 2. The amount of time spent on a contingency fee case by a partner, including the use of a time ratio expressed as a percentage based upon the amount of time reasonably spent on the case prior to the decision to dissolve and the amount of time spent during the winding up phase;
> 3. The amount of work performed by the partner seeking compensation during the winding up phase in relation to the amount of work performed by the other partners; and
> 4. The costs incurred, including reasonable overhead expenses and costs advanced on behalf of a client, by both the dissolving partnership and a partner who completes the case during the winding up period.

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141. *Id.*

142. *See* Thomas v. Marvin E. Jewell & Co., 440 N.W.2d 437 (Neb. 1989) (holding that a partnership agreement in effect at dissolution controls division of profits/losses); *see also* Stacker & Ravich v. Simon, 411 N.W.2d 217 (Minn. Ct. App. 1987).

143. Although quantum meruit has been used as a method of compensation, typically the primary focus is on time spent by the partner before and after dissolution. *See, e.g., Cofer*, 459 S.W.2d at 877. Further, although the compensation model proposed by Epstein and Wisoff does take into account some of these factors, the method articulated for allocating the risk of expectancy is unrealistic and unworkable. *See* Epstein & Wisoff, cited at note 55, at 1622.

Examined together, these factors provide for a more thorough analysis than any one component alone. In fact, courts are well experienced in using this type of approach. In divorce law, for example, in the area of equitable distribution of marital property, many states have promulgated a list of factors that a court is required to examine in reaching its decision as to the allocation of marital property (or its equivalent value).[144] In addition, given the benefit of hindsight in applying this set of criteria, a court can accurately assess the degree of difficulty and risk involved in a given case.

The clients' interests should be served by this approach. By providing an economic incentive that is proportionate to the work load of all of the dissolving partners, and yet recognizing the special skill and energy necessary to bring a case to a successful result, the economic disincentive to complete a case unrewarded is eliminated. As a result, a client can continue to be represented by the attorney of her choice with whom she has developed a relationship of trust until the case is ultimately resolved. In essence, the dissolution of the law firm becomes a non-economic issue for the client.

Determination of Partner's Interest in the Dissolving Law Firm

This factor is fairly easy to ascertain. The court is required to ascertain the percentage interest for each partner. This continues the practice articulated by courts implementing the No Compen-

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144. Factors or criteria typically used in the equitable distribution process are: a) length of marriage; b) any prior marriage of either party; c) the age, health, station, amount and sources of income, vocational skills, employability, estate liabilities and needs of each party; d) the contribution by one party to the education, training, or increased earning power of the other party; e) the opportunity of each party for future acquisitions of capital assets and income; f) the sources of income of both parties, included but not limited to medical, retirement, insurance or other benefits; g) the contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker; h) the value of the property set apart to each party; i) the standard of living of the parties established during the marriage; j) the economic circumstances of each party, including federal, state and local tax ramifications, at the time the division of property is to become effective; and k) whether the party will be serving as the custodian of any dependent minor children. *See* DEL. CODE ANN. tit. 13, § 1513 (1994); ILL. REV. STAT. ch. 750 para. 5/503 (1994); KY. REV. STAT. ANN. § 403.190 (Baldwin 1994); MD. CODE ANN. § 8-205 (1994); ME. REV. STAT. ANN. tit. 19 § 722-A (West 1994); MINN. STAT. § 518.58 (1994); MONT. CODE ANN. § 40-4-202 (1993); N.J. REV. STAT. § 2A: 34-23.1 (1994); NEB. REV. STAT. § 42-365 (1993); OHIO REV. CODE ANN. § 3105.171 (Anderson 1992); 23 PA. CONS. STAT. § 3502 (1994); R.I. GEN. LAWS § 15-5-16.1 (1994); S.C. CODE ANN. § 20-7-472 (Law. Co-op 1993); TENN. CODE ANN. § 36-4-121 (1994); VA. CODE ANN. § 20-107.3 (Michie 1994); WYO. STAT. § 20-2-114 (1994).

sation Rule and should present no new difficulty.

Calculating Reasonable Time Spent on a Case in Terms of a Ratio of Reasonable Time Spent Prior to Dissolution and During the Winding Up Period

This factor is similar to the quantum meruit approach. Courts should examine the amount of time spent by a partner prior to the decision to dissolve, and that amount of time spent during the winding-up phase. By including the concept of "reasonable time spent" courts can examine whether the time claimed to have been spent was reasonable in light of the complexity of the case.[145] By examining time records the court can determine the nature of the work done and the extent to which time might have been spent on trivial matters. In addition, by examining time records, the court can make a finding as to whether work was deliberately postponed by a partner until after the decision to dissolve was made in the hopes of trying to "grab" a larger portion of the fee. Further, this examination allows the court to assess the amount of risk involved in gaining a successful result that was assumed by the partnership. For example, a difficult or high risk case would be treated differently from a case that should have been relatively easy to successfully conclude.

The Amount of Work Performed by the Partner Seeking Compensation During the Winding Up Phase in Relation to Work Performed by the Other Partners

This factor addresses one of the major inequities of the No Compensation Rule. By examining the proportionate work load of each partner during the winding up phase, a court can accurately determine whether any disproportion exists. A partner who puts forth a significant amount of time and energy in only one case can be treated differently from a partner who has many such cases. In addition, a partner who only has one case, but which is high risk and eventually results in no recovery, is not penalized for the time he has put into the case. The time spent in an unsuccessful case can still be measured against those cases completed by the other partners. In essence, the allocation of the risk of losing is spread out among the partners. In addition, the financial reward potentially reaped in any case is placed in relative

145. *See* McLean v. Michaelousky, 458 N.Y.S.2d 1005, 1007 (N.Y. Sup. Ct. 1983) (applying a "reasonable value of work rule" to apportion a fee between a firm and a former associate who continued to work on the case alone).

context with the other cases handled by the dissolving partners.

This factor also allows the courts to acknowledge the partner who spends far more time than others in completing contingent fee cases during the winding up phase. Courts would now be authorized to compensate such a partner for the services rendered.

The Amount of Costs Incurred, Including Reasonable Overhead Expenses and Costs Advanced on Behalf of a Client by Both the Dissolving Partnership and a Partner Who Completes the Case During the Winding Up Period

Under the existing case law based on Section 18(f) of the UPA, courts have been divided on the issue of whether the allocation of winding up income may be adjusted to reflect overhead expenses.[146] When reasonable overhead expenses have been awarded it has been coupled with the denial of extra compensation to a partner for work performed during the winding up phase of the partnership dissolution.[147] In order to avoid calling the award of overhead expenses "compensation," the courts treated the overhead attributable to the winding up of partnership business as a liability to the partnership.[148] Accordingly, prior to the distribution of profits, each partner was entitled to be reimbursed for the overhead expenses attributable to winding up the partnership.[149] In essence, the award of reimbursable overhead expenses was used as a method to avoid some of the inequities that might exist due to the mechanical implementation of the No Compensation Rule.

The *Jewel* court concluded that expenses such as office staff salaries, rent and library costs could be included as overhead expenses.[150] Therefore, the partner seeking reimbursement for these types of expenses should bear the burden of establishing what expense items are chargeable to the unfinished business completed during the winding up phase.[151] Obviously, a partner seeking reimbursement must keep careful records.

146. *See Ellerby*, 485 N.E.2d at 413; *see also Jewel*, 203 Cal. Rptr. at 19-20 (allowing reimbursement of overhead expenses); Hawksworth v. Ponzoli, 388 So.2d 299, 301 (Fla. Dist. Ct. App. 1980) (denying reimbursement because of a strict and literal interpretation of the No Compensation Rule disallowing any extra compensation).

147. *See Ellerby*, 485 N.E.2d at 413; *Jewel*, 203 Cal. Rptr. at 19-20.

148. *See Ellerby*, 485 N.E.2d at 413.

149. *Id.*

150. *Jewel*, 203 Cal. Rptr. at 20.

151. *See* Rosenfeld, Meyer & Susman v. Cohen, 194 Cal. Rptr. 180 (Cal. Ct. App. 1983).

Flynn v. Cohen[152] represents a different approach used by a court to allocate overhead expenses during the winding up period. The court approved a formula which was weighted by the number of months cases handled by each partner in the winding up period were pending.[153] The court asserted that partners who handled the case after dissolution would be reimbursed for the other partner's share of the overhead incurred after dissolution.[154]

Either methodology expressed above could be used by a court in determining a fair allocation of overhead expenses. Moreover, in the absence of adequate record keeping, the formula approach could be utilized if a court was so inclined to award reimbursement.

The issue of reimbursing costs advanced on behalf of the client must also be addressed. The advancement of client costs should be reimbursed to either the partnership or the dissolving partner, whichever or whomever actually advanced the funds.

Critics might claim that the standard offered by this Article might increase litigation and thereby thwart the goal of judicial economy. However, judicial economy is not sacrificed for two reasons. First, courts should not sacrifice the necessity to reach a thorough and fair result for the sake of expediency. Second, the use of a similar type of decision-making standard has not decreased judicial economy in the area of divorce law.[155]

There are many alternatives that can be implemented by court

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152. 581 N.E.2d 30 (Ill. App. Ct. 1991).

153. *Flynn*, 581 N.E.2d at 32-33. The precise formula worked like this: the court first determined the partnership's overhead allowance expressed as a percentage of gross income based on previously filed income tax returns. *Id.* Then the court used the following formula:

A: fee
B: overhead % of partnership
C: number of months case pending
D: total number of months case pending
E: % interest of each partner in the firm

$$\text{Each partner's share of overhead incurred after dissolution} = A \times \frac{B \times C}{D} \times E$$

Id.

154. *Id.*

155. *See* Howard S. Erlanger, Elizabeth Chambliss, & Marygold S. Melli, *Participation and Flexibility In Informal Processes: Cautions from the Divorce Context*, 21 LAW & SOC. REV. 585 (1987) (discussing the relationship between divorce rules and settlement). Erlanger, Chambliss and Melli claim that in the area of divorce, the overwhelming majority of cases, over 90% by some estimates, are settled by the parties. *Id.* at 585.

systems with respect to these types of disputes. For example, a court can order the parties to submit to mediation[156] or submit to arbitration[157] in lieu of or before a case could be adjudicated by a judge and/or jury. The use of these alternative dispute resolution systems would enhance the goal of judicial economy while preserving the ultimate rights of the parties to an adjudication by the courts.

In addition, these types of disputes may be more suited for a voluntary arbitration procedure sponsored by a Bar Association.[158] The adverse publicity and potentially disruptive effects on clients could both be avoided by the use of a private dispute resolution system.

CONCLUSION

This Article has examined section 401(h) of the RUPA and its impact on the interplay of law firm dissolutions and contingent fee cases. Because the No Compensation Rule has the potential to yield harsh and unfair results, to discourage the fiduciary duty among partners, to undermine client choice, and to defeat the principle of freedom of contract, it warrants revision. Section 401(h) of the RUPA, by allowing compensation when it is equitable to do so, eliminates the problems created by the application of the No Compensation Rule.

In applying the No Compensation Rule and the Unfinished Business Rule to the scene described in the beginning of this Article, under the UPA and the No Compensation Rule the answer to the partners' concerns would be clear. Based on the application of these rules, the dissolving partner would be required to

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156. Mediation is a process where a neutral third party tries to facilitate an agreement between disputing parties. The Pennsylvania Bar Association sponsors a Lawyer Dispute Resolution Program which includes mediation. The program handles disputes involving law firm dissolutions, intra-firm disputes, and fee disputes between lawyers in different firms.

157. For example, Pennsylvania requires all civil claims involving $50,000 in larger countries and $25,000 in smaller ones to be submitted to a board of three lawyers who are members of the bar of the court for decision. Although participation is compulsory, the parties are not bound by the arbitration panel's decision. Either party may appeal the decision; this appeal is in the form of a "trial de novo" in the trial court of general jurisdiction (Court of Common Pleas). *See* 42 PA. CONS. STAT. § 7361 (1982 & Supp. 1994).

158. *See* COMMITTEE ON ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION, PROPOSAL FOR ASSOCIATION-SPONSORED ARBITRATION OF DISPUTES AMONG LAWYERS, 42 REC. A.B. CITY N.Y. 877, 878 (1987). Such programs are already in place in Cleveland, Denver, New York City, San Francisco, and Pennsylvania. *See also* Laurel Terry, *Ethical Pitfalls and Malpractice Consequences of Law Firm Breakups*, 61 TEMP. L. Q. 1055, 1124-26 (1988).

complete the contingency fee cases. To the extent that the resolution of these cases is successful, under the UPA, the income generated from these cases would go back to the dissolving partnership to be divided according to each partner's respective interest in the firm. If the award from the contingent fee cases totalled $800,000 and each partner had a 25% interest in the firm, each partner would receive $200,000 regardless of the extra burden placed on the dissolving partner. At most, the dissolving partner completing the cases might re-coup some portion of his office overhead expenses incurred in bringing about a successful conclusion.

However, the RUPA applies a different approach. If the winding up burdens of the partners are not disproportionate to each other, the No Compensation Rule might still be applied and no extra compensation would be awarded. However, to the extent that the winding up burdens of each partner are disproportionate to each other, the RUPA would authorize the award of extra compensation.

The balancing approach set forth in this Article is needed to resolve this tension. The four factors are designed to provide a comprehensive and thorough analysis as to whether to award compensation and how to calculate the actual amount of compensation to award. This approach will neither encourage or discourage law firm dissolutions. Finally, the dissolution of the firm would become a non-economic issue for the client.